Supreme Court, U.S.
FILED
FEB 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

87-1410

No.

IN THE

SUPREME COURT OF THE UNITED STATES

1988 TERM

JOHN BANKS ..... Petitioner

vs.

STATE OF MISSISSIPPI ..... Respondent

PETITION FOR CERTIORARI TO THE MISSISSIPPI SUPREME COURT

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Attorney for
Petitioner

QUESTIONS PRESENTED FOR REVIEW

The errors committed in the trial court were in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, in that (1) evidence of other crimes for which defendant had not been convicted was admitted; (2) prejudicial evidence was admitted without defense counsel's prior access to same; (3) a highly inflammatory statement was introduced against the Petitioner; and (4) defendant was not afforded effective assistance of counsel at either the trial level or the appellate level. The admission of the prejudicial material, coupled with ineffective

assistance of counsel, requires review of this case.

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OPINION BELOW

The Supreme Court of the State of Mississippi entered its decision affirming the conviction of John Banks on December 16, 1987, Banks vs. State of Mississippi, Sup.Ct. No. 57,405. As of this date, the opinion of the Court has not been published.

JURISDICTION

The Mississippi Supreme Court did not render a written opinion in Banks vs. State of Mississippi, Sup.Ct. No. 57,405, decided December 16, 1987; it affirmed the trial court's decision and entered a Mandate with the trial court on January 5, 1988. For the convenience of the Court, a typewritten copy of the Mandate is attached as Appendix "A."

Jurisdiction of the Court is invoked under 28 U.S.C. §1257(c).

CONSTITUTIONAL PROVISION INVOKED

Amendment V, United States Constitution.

> No person. . . , nor be deprived of life, liberty, or property, without due process of law;. . . .

Amendment VI, United States Constitution.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of ther State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; . . . and to have the Assistance of Counsel for his defense.

Amendment XIV, United States Constitution.

> . . .[N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

STATEMENT OF THE CASE

On October 10, 1986, Petitioner, a licensed bailbondsman in the State of Mississippi, posted a $1,000.00 bond for Hugh Evan Brister and his wife. No initial payment was made by the Bristers on this bond. The conditions of the bond, as explained to the Bristers, were that they pay the Petitioner $100.00 within a week, then repay the balance due when possible, that they report for their trial date, and that they report to Petitioner's office once a week to sign in on their file. The Bristers acknowledged their understanding of these conditions.

On October 29, 1986, the Bristers had paid the $100.00, yet had failed to report to Petitioner's office, after repeated attempts by Petitioner to contact them by telephone and by visits to their home. Petitioner, along with an assistant, proceeded to the home of the Bristers, to obtain an explanation as to their failure to report in; otherwise, Petitioner was prepared to take them to jail and be released from their bond.

Upon Petitioner's arrival at the Brister home, he was confronted by Mr. Brister, who, after cursing the Petitioner and refusing to accompany Petitioner to his office, attacked Petitioner with a large stick, striking him on the head. After attempting to

strike Petitioner a second time, and after attempting to shut his door and slamming the door on Petitioner's knee, Petitioner drew his gun and fired twice, hoping to scare Brister. Brister fled to the rear of his house with the stick, with Petitioner following close behind. Petitioner fired three more times in the ceiling and floor, intending for Brister to stop. Brister was finally apprehended, handcuffed, and, after much resistance, placed in the trunk of Petitioner's automobile. Both Brister and his wife were transported to the City of Jackson, Mississippi, Police Department, where it was learned that they had been bound over to the Hinds County, Mississippi,

Sheriff's Office. The Sheriff's Office accepted Mrs. Brister, but refused to accept Mr. Brister due to an injury inflicted during his struggle with Petitioner. Petitioner took Mr. Brister to a bondsman's office and had Brister clean himself. While at the bondsman's office, Petitioner was arrested by the City of Jackson, Mississippi, Police Department, and charged with aggravated assault (said statute being attached hereto as Appendix "C").

Being a licensed bailbondsman, Petitioner, under Mississippi law, is allowed to use whatever force necessary to obtain violators (said statute being annexed hereto as Appendix "D"). On the

basis of this statute, Petitioner's primary defense was one of self-defense.

Petitioner's trial was held on January 8 through the 10th, 1987, in the Circuit Court of the First Judicial District of Hinds County, Mississippi. Petitioner's trial was frought with constitutional violations. First, the State attempted to introduce the front door of the Brister home. Petitioner had filed a discovery motion under Rule 4.06 of the Mississippi Uniform Criminal Rules of Circuit Court Practice (Appendix "E"), yet the State failed to notify Petitioner of the presence of this door, and allow him to examine the door, nor was Petitioner

allowed adequate time within which to examine the door. Petitioner made a timely objection to its use (Appendix "F"), yet was overruled. This constituted his second assignment of error and was violative of his Fifth Amendment and Fourteenth Amendment rights to due process. Secondly, evidence of a stolen rifle was allowed into evidence against Petitioner - evidence of a crime and/or bad acts for which Petitioner had not been convicted; upon Petitioner's objection, the lower court overruled same and allowed its introduction into evidence, in direct violation of Petitioner's Fourteenth Amendment due process rights (See Appendix "G"). Third, the lower

court allowed the introduction of a highly prejudicial statement alleged to have been made by Petitioner; the introduction of this statement proved to be more prejudicial than probative and its admission proved to be in direct violation of Petitioner's due process rights under the Fourteenth Amendment (Appendix "H"). Lastly, the Petitioner was afforded ineffective assistance of counsel in both the trial court and appellant court levels. His trial counsel failed to discover the presence of the front door, on his own questioning allowed the introduction of material prejudicial to the Petitioner, failed to object to the State's prejudicial contentions in their closing

arguments (Appendix "I"), improperly allowed in a prejudicial statement against Petitioner's interest, failed to investigate Petitioner's criminal record and its relation to his activities on October 29th (Appendix "J"), failed to investigate the Petitioner's possible lying under oath (Appendix "K"), failed to file a rebuttal brief and failed to timely file a Petition for Rehearing -- all in violation of Petitioner's Sixth and Fourteenth Amendment rights.

In Petitioner's Brief to the Mississippi Supreme Court, three assignments of error were presented.

PROPOSITION I.

IT WAS ERROR FOR THE TRIAL COURT NOT TO GRANT THE DEFENDANT A

MISTRIAL WHEN A WITNESS FOR THE STATE TESTIFIED THAT A STOLEN RIFLE WAS RECOVERED FROM THE TRUNK OF THE AUTOMOBILE OF THE DEFENDANT.

PROPOSITION II.

IT WAS ERROR FOR THE TRIAL COURT TO ADMIT THE DOOR INTO EVIDENCE SINCE THE STATE HAD FAILED TO PROVIDE THE DISCOVERY REQUIRED BY RULE 4.06 TO THE UNIFORM RULES OF CRIMINAL PROCEDURE.

PROPOSITION III.

IT WAS ERROR FOR THE TRIAL COURT NOT TO GRANT A MISTRIAL WHEN A WITNESS FOR THE STATE MADE A HIGHLY PREJUDICIAL AND INFLAMMATORY STATEMENT IN THE PRESENCE OF THE JURY.

Mississippi Supreme Court affirmed Petitioner's conviction, without written opinion (Appendix "A"). It is from this Mandate that the Petitioner respectfully requests this Honorable Court to review his conviction.

ARGUMENT

Petitioner contends that the evidence admitted over his objection, by the trial court, improperly influenced the jury, thereby causing him to be wrongly convicted. Alternatively, the ineffective assistance of counsel at both the trial and appellate level resulted in a conviction for Petitioner, along with a denial of his fundamental rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution.

EVIDENCE OF OTHER CRIMES FOR WHICH DEFENDANT/PETITIONER HAD NOT BEEN CONVICTED WAS ADMITTED.

While searching Petitioner's vehicle, pursuant to a warrant, on

October 29, 1986, police officers discovered in the trunk of Petitioner's automobile an AR-15 rifle, which upon further investigation, was found to be stolen. The investigating officers, photographing the automobile and its contents, made a photograph of Petitioner's trunk in which was included this AR-15 rifle.

Under cross-examination, the arresting officer, Patrolman Webb, stated that he found a "stolen" AR-15 rifle, to which Petitioner promptly objected and asked that the jury be instructed to disregard same, whereupon the trial court individually questioned each juror as to their ability to disregard such evidence (Appendix "G").

Photographs of this gun had been introduced earlier during the testimony of the arresting officer.

The introduction of testimony regarding a "stolen" gun found in Petitioner's automobile unduly prejudiced the Petitioner.

"Proof of a crime distinct from that alleged in an indictment is not admissible against the accused." Tobias v. State, 472 So.2d 398, 400 (Miss. 1985). The introduction of the evidence placed in the jury's mind that the Petitioner was possibly guilty of an unrelated crime; why would he not be guilty of the one for which he is being tried? The jury gave "excessive weight" to the evidence, thereby ". . .

divert[ing] [their] . . .attention. . . from the question of the [Petitioner's] responsibility for the crime charged to the improper issue of his bad character." U.S. v. James, 555 F.2d 992, 1000 (D.C.Cir. 1977), quoting U.S. v. Phillips, 401 F.2d 301, 305 (7th Cir. 1968). "Even when the trial judge carefully instructs the jury regarding . . . evidence of other crimes, prejudice to the Defendant is 'well-nigh' inescapable." U.S. v. Carter, 482 F.2d 738, 740 (D.C. Cir. 1973), as cited in U.S. v. Daniels, 770 F.2d 1111, 1116 (D.C. Cir. 1985).

Evidence of the stolen rifle unduly tainted the jury's mind against the Petitioner. The trial court's

questioning of the individual jurors as to their ability to disregard the evidence tended to underscore its weight and significance. The evidence was improperly admitted and was prejudicial to Petitioner's case, thereby violating his Fourteenth Amendment due process rights.

PREJUDICIAL EVIDENCE WAS ADMITTED WITHOUT DEFENSE COUNSEL'S PRIOR ACCESS TO SAME

Petitioner filed a pretrial discovery motion (Appendix "B") pursuant to Rule 4.06, Mississippi Uniform Criminal Rules of Circuit Court Practice (Appendix "E"). Contrary to this rule and the Mississippi Supreme Court's ruling in Hentz v. State, 489 So.2d

1386, 1388 (Mississippi 1986), the State presented evidence - the front door to the Brister home - without having notified the Petitioner of its existence nor having allowed Petitioner the opportunity, prior to trial, to examine it. Petitioner promptly objected to its introduction, with said objection being overruled (Appendix "F").

The Petitioner contends that the door presented evidence favorable to his version of the events of October 29, 1986, and that denial of same denied him possible exculpatory material.

The denial, by the State, of the opportunity to view this evidence is in direct contradiction to this Court's

ruling in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), which "requires the State to disclose to the Defendant all favorable evidence material either to guilt or punishment." Barnes v. Lynaugh, 817 F.2d 336, 338-339 (5th Cir. 1987). "[The] State has a duty to provide an accused with all evidence in the State's possession materially favorable to the accused's defense." Moore v. Kemp, 809 F.2d 702, 719 (11th Cir. 1987). "Suppression of favorable, material evidence denies a Defendant's constitutional right to due process." Brogdon v. Blackburn, 790 F.1d 1164 (5th Cir. 1986), cert. denied, _____U.S.____ 107 S.Ct. 1985, 95 L.Ed. 2d 824 (1987)

as cited in Barnes v. Lynaugh, Supra.

The State's refusal to provide Petitioner with the door effectively denied him the opportunity to use exculpatory material. His review of the evidence prior to trial would have allowed him to obtain experts who may have countered testimony introduced by the State and supported Petitioner's version of the events of October 29, 1986, and as to the trajectory of the first two shots fired by the Petitioner. The State's actions resulted in a direct violation of Petitioner's due process rights under the Fifth and Fourteenth Amendments, for which Petitioner's cause should be heard by this Honorable Court.

A HIGHLY INFLAMMATORY STATEMENT WAS INTRODUCED AGAINST PETITIONER

The Petitioner, while transporting the Bristers to the Jackson, Mississippi, Police Department, was allegedly to have responded to Mrs. Brister's staement that the Petitioner had almost killed her husband, "I wished I had killed the son of a bitch." (Appendix "H") when introduced on rebuttal, the witness, contrary to the State's earlier representations to the Petitioner and the Court, expounded on this statement (see Appendix "H").

The Petitioner initially objected to the introduction of the statement as not being proper rebuttal as it was not brought out on direct testimony, which the trial court overruled. When the

expounded statement was introduced, Petitioner immediately objected and requested that the jury be asked to disregard portions of the statement.

The statement by Mrs. Brister had no probative value in its introduction. It's sole purpose was to inflame the jury, causing undue prejudice to Petitioner. "Evidence which is incompetent and inflammatory in character carries with it a presumption of prejudice." Gallion v. State, 469 So.2d 1247, 1250 (Miss. 1985), citing Tudor v. State, 299 So.2d 682 (Miss. 1974). See also, U.S. v. Burton, 737 F.2d 439 (C.A.Tex.1985). In U.S. v. Reme, 738 F.2d 1156 (11th Cir. 1984), evidence thought to be prejudicial to

the Defendant was admitted, yet, throughout the trial the jury was cautioned as to the limited purpose of the evidence. It was also given three and one-half pages of instructions as to its limited purpose. The Petitioner here was only afforded a small notice to the jury, which did little, if anything, in protecting the Petitioner from the resultant prejudice.

As with the admission of the evidence of the stolen rifle, the Petitioner suffered irremediable harm to his due process rights under the Fourteenth Amendment. He would ask this Honorable Court for a review of his claim regarding the admission of this prejudicial evidence.

PETITIONER WAS NOT AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment to the U. S. Constitution is aimed at providing a Defendant with a fair trial. Part of that fair trial includes the right to assistance of counsel. This right to effective assistance of counsel is based on the right to counsel itself. Evitts v. Lucey, 469 U.S. 387, 397, n.7 (1985).

Petitioner had retained counsel for his trial; the same counsel also presented his subsequent appeal to the Mississippi Supreme Court. Petitioner would contend that, in the alternative, if he had been afforded adequate representation by counsel at both the trial court level and at the appellate level, the resultant constitutional errors

would not have been present, and ". . . the trial court cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984).

The errors previously ennumerated in the Petition would have not occurred had Petitioner's trial counsel adequately investigated his case. The door would have easily been found prior to trial; it's location was known to all the prosecution and could have been known to Petitioner's counsel (Appendix "F"). The evidence regarding the stolen rifle could have been foreseen, without Petitioner's counsel "stumbling" over same on his cross-examination of the investigating officer. (Appendix "G"). The effect

of the inflammatory statement could have been lessened by early discovery and pretrial motions to exclude the evidence. The Petitioner's counsel failed to properly investigate Petitioner's prior criminal record and its relationship (brought out at trial) to his possession of a firearm on October 29 (Appendix "J"). His counsel failed to properly investigate and defend the State's contention that the Petitioner was lying under oath when he applied for his bonding license. (Appendix "K"). Counsel also failed to object to a prejudicial, and totally erroneous, remark made by the State in their closing argument (Appendix "I"). Finally, Petitioner's counsel failed to file a rebuttal brief to the State's

brief on appeal and failed to file a timely Petition for Rehearing.

The standards set forth in Strickland, Supra, are that (1) counsel's performance be deficient and (2) that the deficient performance have prejudiced the Petitioner. Strickland, Supra at 687. A review of the pertinent errors, and the appendices (set forth above) will be sufficient to show an ineffective assistance of counsel at the trial court level.

The failure to file a rebuttal brief, failure to file a timely Petition for Rehearing, coupled with a failure to properly note errors at the trial court level, resulted in ineffective counsel at the appellate level.

The Mississippi Supreme Court has held that there is a right to effective assistance of counsel on appeal. Irving v. State, 441 So.2d 846, 856 (Miss. 1983). This Court has upheld that right in Evitts v. Lucey, 469 U.S. 387 (1985).

The Petitioner was not afforded effective counsel at either the trial court or the appellate level. Failure to receive such resulted in prejudicial evidence being introduced against the Petitioner and in a failure to adequately defend against the State's charges. The failure of counsel at the appellate level resulted in a failure to protect Petitioner's claims of error before the Appellate Court and a failure to protect his subsequent appeal rights. For this reason the

Petitioner respectfully requests a review of his case by this Honorable Court.

CONCLUSION

A full reading of the trial transcript supports Petitioner's contentions that without the multiplicity of error by the trial court, and the resultant violations of Petitioner's Fifth, Sixth and Fourteenth Amendment rights, Petitioner would not have been convicted. This Court should grant certiorari to review the Fifth, Sixth and Fourteenth Amendments violations committed by the Courts of Mississippi against John Banks.

Respectfully submitted,

JOHN BANKS, PETITIONER

BY: Samuel H. Wilkins

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MANDATE FROM THE

SUPREME COURT OF MISSISSIPPI

TO THE CIRCUIT COURT OF

HINDS COUNTY - GREETINGS

WHEREAS, on the 16th day of December, 1987, the same being a day of the regular term of the Mississippi Supreme Court, begun and held in the Courtroom, in the Gartin Building, in the City of Jackson, Mississippi, on the 2nd Monday of September, in the year of our Lord, 1987, the following final judgment was rendered by the Mississippi Supreme Court, to-wit:

JOHN H. BANKS

#57,405 v.

STATE OF MISSISSIPPI

This cause having been submitted

on the record from the Circuit Court of Hinds County and this Court having considered the same is of the opinion that there is no error therein and doth order that the Judgment of said Circuit Court rendered in this cause on the 13th day of January, 1986, a conviction of aggravated assault and a sentence to serve a term of ten (10) years in the Mississippi Department of Corrections, be and the same is hereby affirmed.

It is further ordered that the appellant do pay all of the costs of this appeal to be taxed.

YOU ARE THEREFORE HEREBY COMMANDED, that such execution and further proceedings be had in said cause, as according to right and justice, and the judgment of our SUPREME COURT and the law of the land ought to be had.

WITNESS, the Hon. Roy Noble Lee, Chief Justice of the Mississippi Supreme Court; also the signature of the Clerk and the Seal of said Court hereunto affixed, at office, in the City of Jackson, this the 4th day of January, A.D., 1988.

Sue Gordon, Clerk

IN THE CIRCUIT COURT OF THE

FIRST JUDICIAL DISTRICT

OF HINDS COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI PLAINTIFF

VS. NO. A-486

JOHN BANKS DEFENDANT

MOTION FOR DISCOVERY OF EXCULPATORY MATTER PURSUANT TO BRADY V. MARYLAND, 373 U.S. 83 (1963 and UNITED STATES V. AGURS, 427 U.S. 97 (1967)

Comes now the Defendant, by and through his counsel of record, and respectfully moves this Honorable Court to enter an order requiring the State to produce or permit Defendant to inspect, copy, and/or photograph any material of an exculpatory nature in the case against the Defendant, is provided by Brady v. Maryland, 373 U.S.

83 (1963) and United States v. Agurs, 427 U.S. 97 (1976), and their progeny, including, but not limited to the following, to-wit:

1. Any information relative to any of the witnesses to be called by the State which, if known why the defense would be instrument in impeaching the credibility of the witness or rendering improbable the substance of his/her testimony.

2. Any statements, written, recorded or oral, made by any co-defendant, co-indictee, witness or other person which indicates Defendant is innocent of the crime charged or that Defendant's culpability and involvement were substantially less severe than that charged in the indictment.

3. If applicable, any information relative to the alleged victim herein which tends to support that Defendant herein acted in self-defense, including but not limited to:

A. Any prior criminal record of the victim;

B. Any prior history of violence by the victim;

C. Any history of mental illness or mental defect suffered by the victim;

D. Any prior threats, direct or indirect, by the victim toward the Defendant or any other person;

E. Prior reports made to any law enforcement office concerning threats made by the victim toward the Defendant or any other person or any information communicated to any law enforcement

officer which tends to evidence that the Defendant was in apprehension of fear of violence from the victim.

4. If applicable, names and addresses of any persons within the State's knowledge who could testify that Defendant was not present when the crime was committed, thus could be considered witnesses on behalf of an alibi defense, if presented by the defense.

5. Any other information within the possession, custody or control of the State or which could, through the exercise of diligence, be known by the State or its agent(s), which tends to exculpate Defendant of the charges against him.

Respectfully submitted,

JOHN BANKS

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His Attorney

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CERTIFICATE OF SERVICE

I, the attorney for the Defendant, do hereby certify that I have this date delivered a true and correct copy of the foregoing Motion to the Honorable Patricia Bennett, Assistant District Attorney, at his/her usual office address at the Hinds County Courthouse, Jackson, Mississippi.

This the 29 day of August, A.D., 1985.

JACK H. YOUNG

§97-3-7. Simple Assault;
aggravated assault.

(2) A person is guilty of aggravated assault if he (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; and, upon conviction, he shall be punished by imprisonment in the county jail for not more than one (1) year or in the penitentiary for not more than twenty (20) years.

APPENDIX "C"

§99-5-27. Sureties may arrest and surrender principal.

Bail may, at any time before final judgment, surrender their principal, in vacation to the sheriff, or in open court, in discharge of their liability; but if this be done after forfeiture of the bond or recognizance, the breach of the bond or recognizance must be satisfactorily excused before the court, and all costs be paid by the bail, and such part of the bond or recognizance as the court orders. Upon surrender, the sheriff in vacation, and the court in term-time, may discharge the prisoner on his giving new bail, but if he does not give new bail, he shall be detained

in jail. Bail may arrest their principal anywhere or authorize another to do so.

RULE 4.06 DISCOVERY

(a) The prosecution shall disclose to each defendant or to his attorney, and permit him to inspect, copy, test, and photograph upon request and without further order the following: . . . .

* * *

(5) Exhibit any physical evidence and photos to be offered in evidence; and . . .

* * *

. . .Upon a showing of materiality to the preparation of the defense, the court may require such other discovery to defense counsel as justice may require.

APPENDIX "E"

BY MR. MAYFIELD:

We've got the door if you want to see it. I want to have it marked for identification.

BY MR. SCALES:

We are gonna object to that. That can't go to the Supreme Court.

BY MR. MAYFIELD:

I have a picture of it.

BY MR. SCALES:

Just let the picture go.

* * *

BY THE COURT:

Do you want to view it outside the presence of the jury?

BY MR. EAVES:

Yes, sir.

* * *

APPENDIX "F"

BY THE COURT:

No., I'll just send the jury out.

BY MR. MAYFIELD:

Okay.

BY THE COURT:

Members of the jury, step in the jury room, please.

* * *

BY MR. SCALES:

We had agreed to furnish each other all of the evidence we were gonna introduce in the case.

BY MR. MAYFIELD:

What do you want me to sign, Mr. Scales?

* * *

BY MR. SCALES:

I would like for this Order to be entered.

BY THE COURT:

Do you have any objection to the Order?

BY MR. MAYFIELD:

Your Honor, certainly not if your Honor thinks it's proper I have no objection to it.

BY THE COURT.

All right. What attempts were made to review the physical evidence in the case, Mr. Eaves or Mr. Scales?

BY MR. EAVES:

Your Honor, I had a meeting with Ms. Bennett. We went over the discovery and we went over to the Property Division of the Jackson Police Department and went through all the exhibits and evidence there in the Jackson Police Department and at no time was this door disclosed. Everything else -- we looked at every piece of evidence that we knew of that the Jackson Police Department had but never -- we didn't even know anything about the door. The door wasn't there and there was no indication that there was a door, Your Honor.

BY THE COURT:

What has been the physical location of the door?

BY MR. MAYFIELD:

Your Honor, it's my understanding that it's been in the possession of the victim. Is that correct, Mr. Brister?

BY THE WITNESS:

Yes, sir.

BY MR. MAYFIELD:

It's been in your possession since it happened?

BY THE WITNESS:

Yes, sir.

BY THE COURT:

When did you know of the door, Ms. Bennett?

BY MS. BENNETT:

When did I know of the door?

BY THE COURT:

Yes, ma'am.

BY MS. BENNETT:

I'm not sure I ever personally knew of the door. We did go over to Property and Evidence and asked to see all of the evidence and we looked at everything they brought out which is what they are telling us here. They couldn't have brought this out because it was not over there. All I can say on that is I do recall that the case was set for trial once before when I had another trial or was out of town and I do recall something at that time coming up about the door but I think Mr. Wallace had worked on it at that time and he is trying the case here today. I can't say that I ever personally had knowledge that there was a door.

BY THE COURT:

For the record, I might explain that Ms. Bennett was the origianl Assistant District Attorney handling the case but she's tied up with a case that started yesterday and has not been completed. Is that correct?

BY MS. BENNETT:

That's correct.

BY THE COURT:

All right. When did you first know about the door, Mr. Wallace?

BY MR. WALLACE:

Your Honor, I first knew of the door the last time it was set for hearing and I think, if I'm not mistaken, we mentioned that we did have the door. The defense has seen photographs of the same door but I think it was mentioned that we had the door.

BY THE COURT:

Were you aware that photographs had been made of the door?

BY MR. EAVES:

We saw the photographs of the door at the Police Department.

BY THE COURT:

Well, under all the circumstances, I am gonna allow the -- I don't believe that there has been a true violation of the rules but we will take a recess at this point until you've had sufficient time to examine the door. I also might mention for the record that Mr. Wallace indicatd that there were bullet holes in the door and Mr. Scales indicated he didn't see any a while ago so you might take a real close look at it this time. Let me know when you are ready to proceed.

BY THE COURT:

Have you had sufficinet time, Mr. Eaves?

BY MR. EAVES:

Yes, Your Honor.

BY MR. MAYFIELD:

Q. Go ahead.

A. --The third picture which is for identification purposes and is numbered 20 is a photograph of the interior of the trunk of that same vehicle which contains items that have been recovered and entered into evidence here.

* * *

BY MR. MAYFIELD:

May it please the Court, we would now move the introduction of Exhibits #19 through --

* * *

BY MR. MAYFIELD:

May I pass these to the jury, Your Honor?

BY THE COURT:

Yes, sir.

* * *

BY MR. EAVES:

Q. What did you not bring up here?

BY MR. MAYFIELD:

I object to the form of the question, Your Honor.

BY THE COURT:

Overruled.

BY THE WITNESS:

A. Well, there was the AR-15 rifle -- stolen AR-15 rifle also that we recovered in the trunk of the car.

BY MR. EAVES:

We object to that.

BY THE WITNESS:

Well, you asked the question.

BY MR. EAVES:

And we would like to be heard outside the presence of the jury.

BY THE COURT:

Members of the jury, step in the jury room, please.

* * *

BY THE COURT:

Members of the jury, I want you to listen closely to my instructions I'm giving you at this point. In response to the question, the witness stated that he recoverd a rifle from the defendant's vehicle. He also stated that it was stolen, That is not an issue before this Court whether it was or was not stolen and I am instructing each of you to disregard that portion of the answer that referred to the rifle as being stolen. I need to ask each of you do you understand my question. I'll ask for a show of hands if there are any of you who do not understand my instructions. Ms. Lide, do you understand my instructions?

BY MS. LIDE:

Yes, sir.

BY THE COURT:

Will you disregard it?

BY MS. LIDE:

Yes, sir.

BY THE COURT:

Mr. Beecham, do you understand my instructions?

BY MR. BEECHAM:

Yes, sir.

BY THE COURT:

Will you disregard it?

BY MR. BEECHAM:

Yes, sir.

BY THE COURT:

Ms. Lawshe, do you understand my instructions?

BY MS. LAWSHE:

Yes, sir.

BY THE COURT:

Will you disregard it?

BY MS. LAWSHE:

Yes, sir.

BY THE COURT:

Ms. Irwin, do you understand my instructions?

BY MS. IRWIN:

Yes, sir.

BY THE COURT:

Will you disregard it?

BY MS. IRWIN:

Yes, sir.

BY THE COURT:

Ms. Warren, do you understand my instructions?

BY MS. WARREN:

Yes.

BY THE COURT:

Will you follow them?

BY MS. WARREN:

Yes.

BY THE COURT:

Mr. McInnis, do you understand my instructions?

BY MR. MCINNIS:

Yes, sir.

BY THE COURT:

Will you follow them?

BY MR. MCINNIS:

Yes, sir.

BY THE COURT:

Ms. Holly, do you understand my instructions?

BY MS. HOLLY:

Yes, sir.

BY THE COURT:

Will you follow them?

BY MS. HOLLY:

Yes, sir.

BY THE COURT:

Ms. Westmoreland, do you understand my instructions?

BY MS. WESTMORELAND:

Yes, sir.

BY THE COURT:

Will you disregard it?

BY MS. WESTMORELAND:

Yes, sir.

BY THE COURT:

Ms. Sutherland, do you understand my instructions?

BY MS. SUTHERLAND:

Yes, sir.

BY THE COURT:

Will you disregard it?

BY MS. SUTHERLAND:

Yes, sir.

BY THE COURT:

Mr. Lee, do you understand my instructions?

BY MR. LEE:

Yes, sir.

BY THE COURT:

Will you disregard the answer?

BY MR. LEE:

Yes, sir.

BY THE COURT:

Ms. McKlemurry, do you understand my instructions?

BY MS. MCKLEMURRY:

Yes, sir.

BY THE COURT:

Will you disregard the answer?

BY MS. MCKLEMURRY:

Yes, sir.

BY THE COURT:

Ms. Helfrich, do you understand my instructions?

BY MS. HELFRICH:

Yes, sir.

BY THE COURT:

Will you disregard the answer?

BY MS. HELFRICH:

Yes, sir.

BY THE COURT:

Mr. Groves, do you understand my instructions?

BY MR. GROVES:

Yes, sir.

BY THE COURT:

Will you disregard that portion of the answer?

BY MR. GROVES:

Yes, sir:

BY THE COURT:

Thank you. Are you satisfied with my instructions?

BY MR. EAVES:

Yes, sir.

BY THE COURT:

Mr. Mayfield, are you satisfied with my instructions?

BY MR. MAYFIELD:

The State is satisfied.

BY THE COURT:

Thank you. You may proceed.

BY MR. MAYFIELD:

I'm offering not to do it if you don't accuse me of asking it in bad faith.

BY MR. SCALES:

Well, I object.

BY MR. MAYFIELD:

You object to calling her or not calling her?

BY MR. SCALES:

To calling her as a witness.

* * *

BY THE COURT:

Well, call the witness and let's move along.

BY MR. MAYFIELD:

We call Veronica Brister at this time, Your Honor.

* * *

APPENDIX "H"

BY MR. MAYFIELD:

Q. Your name, please?

A. Veronica Brister.

Q. And you have testified previously in this case?

A. Yes, sir.

Q. Directing your attention to the night of October 29, 1984, do you recall that night?

A. Yes, sir.

Q. In route from your home to downtown, what, if any, statement did the defendant, John Banks, make to you with respect to your husband?

BY MR. SCALES:

With respect to that, we enter an objection. We object to any statement that wasn't brought out on direct examination. We don't think that is proper rebuttal testimony. He had the opportunity to ask this witness that on direct examination. He didn't do it and he failed to do it and now he's attempting to do that which he can't do otherwise.

BY THE COURT:

Is that your only objection?

BY MR. SCALES:

That's our only objection.

BY THE COURT:

Overruled. Let's move along.

BY MR. MAYFIELD:

Q. You may answer the question. Do you remember what my question was?

A. Yes, sir.

Q. All right. Would you tell the jury what he said and use the exact words?

A. Yes, sir. When we were pulling off from my house on the way to downtown, I asked him - - I said where is my husband and they said - - he's in the back of this mother fucker. I said - - well, you have already almost tried to kill him - - he's not gonna be able to breath in there. And he told me - -

* * *

Q. All right, go ahead.

A. I told him - - you've already almost tried to kill him - - he can't breathe back there. Mr. Banks told me - - I should have killed the son of a bitch. That's what he said.

BY MR. SCALES:

Now, Your Honor, that's contrary to what counsel represented that she was gonna say. All of that wasn't asked of this witness on the examination. He didn't lay any predicate for all that stuff. Now, that's highly prejudicial.

BY THE COURT:

Sustained, Mr. Scales.

BY MR. SCALES:

I ask that the jury be instructed to disregard her volunterring testimony there to prejudice their minds in this case.

* * *

BY THE COURT:

Members of the jury, you are to disregard that portion of the witness's testimony that led up to the remark that was alleged to have been made to her by the defendant that he wished he had killed the individual, Mr. Brister, or similar words to that effect.

BY THE COURT:

Do each of you tell me on your oath that you will follow my instructions and disregard that portion as directed?

(Jurors nodding)

BY THE COURT:

Let the record reflect that all the jurors including the alternate answered in the affirmative. Let's move along.

" . . . The first thing that I wanted to bring to your attention are things that I found to be inconsistent. John Banks testified that, when they got to the door, he heard the children. Then he later said that he didn't hear any children. . . ."

APPENDIX "I"

BY MR. MAYFIELD:

Q. My question to you was, were you carrying the weapon that is marked as Exhibit #16 on the 29th of October, 1984?

A. Yes, sir.

Q. Was that before or after you had been convicted of not one but two felonies?

BY MR. EAVES:

To which we object, Your Honor, on the same grounds.

BY THE COURT:

Overruled.

BY THE WITNESS:

A. Sir - -

BY MR. MAYFIELD:

Could the witness be instructed to answer the question?

BY THE COURT:

Yes, just answer the question and you may explain if you desire to do so.

BY MR. MAYFIELD:

Q. Answer the question and then you can explain it.

A. Yes.

Q. All right.

A. Now can I explain?

Q. Explain anything you want to, Mr. Banks, as long as it relates to the question.

A. Ladies and gentlemen of the jury, when I purchased that gun, I was under the impression that a felony type violent crime act was when you couldn't buy a gun or have a handgun and my crime of a felony was a non-violent type crime; therefore, in my mind, I thought that I could have that gun but, after my lawyer explained to me later after the incident happened, I wasn't allowed to carry that gun and that's what happened.

BY MR. MAYFIELD:

Q. Mr. Banks, directing your attention to question number 17 on that application, would you read that question to the jury, please?

A. Yes, sir. Have you ever been convicted of a felony or a misdemeanor?

Q. And out beside it are two blocks. Is that right?

A. Yes, sir.

Q. One of them is yes and one of them is no. Right?

A. That's correct.

Q. And which block is checked?

A. Sir, on my answer to that, I want to explain to you again.

Q. You answer which one is checked and then you can explain it.

A. It has no on it. No is checked.

Q. It's checked no.

A. Yes, sir.

Q. All right.

APPENDIX "K"

A. Now let me explain.

Q. I want you to.

A. As I said up front, the application was submitted for me. What I did was just sign my name and that was it.

Q. Mr. Banks?

* * *

Q. Are you telling this jury that you didn't read this application through before you submitted it?

A. All I did, like I said at first, it was submitted for me. The only thing I did was sign it.

Q. Did you read it before you signed?

A. No, sir, I just signed it.

* * *

Q. What does this say down here below your signature?

A. (Witness looking).

Q. Read that to the ladies and gentlemen of the jury.

A. Subscribed and sworn to before me this 24th day of August, 1984. Notary Public, Hubert West.

Q. Doesn't it say sworn to?

A. Yes, sir.

Q. Do you know what sworn to means?

A. Yes, that's an oath.

Q. An oath to tell the truth.

A. That's correct.

Q. Do you know Mr. Hubert West?

A. Yes, sir, I know of him.

BY MR. MAYFIELD:

May it please the Court, I would move the introduction of #36 for identification into evidence.

BY MR. EAVES:

To which we object as to our previous objection.

BY THE COURT:

Overruled. It may be admitted.

IN THE SUPREME COURT OF THE STATE
OF MISSISSIPPI

JOHN BANKS — APPELLANT

VS. — NO. 57,405

STATE OF MISSISSIPPI — APPELLEE

NOTICE OF APPEAL TO
THE SUPREME COURT OF THE
UNITED STATES

NOTICE IS HEREBY GIVEN that John Banks, the Appellant above named, hereby appeals to the Supreme Court of the United States from the affirmance of Appellant's conviction in the Circuit Court of the First Judicial District of Hinds County, Mississippi on December 16, 1987.

This appeal is taken pursuant to 28 U.S.C. §1257(c).

This Court affirmed, without written opinion, that Appellant's conviction on the charge of aggravated

assault, despite Appellant's claim that the errors committed in the lower court were such that a reversal of his conviction was required.

THIS this 16th day of February, 1988.

/s/Samuel H. Wilkins
Samuel H. Wilkins
Attorney for Appellant

SAMUEL H. WILKINS
Attorney at Law
105 North State Street
P. O. Box 504
Jackson, Mississippi 39205
(601) 354-0770

CERTIFICATE

NOTICE is hereby given that I have this day mailed a true and correct copy of the above and foregoing Notice of Appeal to the U.S. Supreme Court to the Honorable Mike Moore, Attorney General for the State of Mississippi, Honorable William Coleman, Circuit Judge, First Judicial District of Hinds County, Mississippi, and the Honorable Edward Peters, District Attorney, Hinds County, Mississippi at their usual mailing addresses.

DATED this the 16th day of

February, 1988.

/s/Samuel H. Wilkins
Samuel H. Wilkins

VERIFIED PROOF OF SERVICE OF
FILING A PETITION FOR
CERTIORARI TO THE
MISSISSIPPI SUPREME COURT

I, SAMUEL H. WILKINS, being first duly sworn upon my oath allege and say:

1. That I am a member of the Bar of the United States Supreme Court.

2. That on the 16th day of February, 1988, I deposited at the United States Post Office, Jackson, Mississippi, first class postage pre-paid and properly addressed to the Clerk of this Court, forty (40) copies of the Petitioner's Petition for Certiorari within the time allowed for filing.

3. That, in addition, I hand delivered three (3) copies of Petitioner's Petition for Certiorari to the Honorable Mike Moore, Attorney General for the State of Mississippi, at his address of Gartin Justice Building, Jackson, Mississippi.

4. That, in addition, I hand delivered three (3) copies of the Petition to the Honorable Edward Peters, District Attorney for Hinds County, Mississippi at his address of Hinds County Courthouse, West Street, Jackson, Mississippi.

5. That, in addition, I hand delivered one (1) copy of the Petition

to the Honorable William Coleman, Circuit Judge, Hinds County, Mississippi, at his address of Hinds County Courthouse, West Street, Jackson, Mississippi.

Samuel H Wilkins

SAMUEL H. WILKINS